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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 777

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IN THE MATTER OF CONSTRUCTORS OF FLORIDA, INC., Debtor in Reorganization

THE CORAL GABLES FIRST NATIONAL BANK and PAN AMERICAN BANK OF MIAMI,

Petitioners,

—versus—

AMERICAN SURETY COMPANY OF NEW YORK, and JOHN NICHOLAS, as Trustee,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMERICAN SURETY COMPANY OF NEW YORK, RESPONDENT, IN OPPOSITION

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THE CORAL GABLES FIRST NATIONAL BANK and PAN AMERICAN BANK OF MIAMI,

Petitioners,

VERSUS

AMERICAN SURETY COMPANY OF NEW YORK, and JOHN NICHOLAS, as Trustee,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMERICAN SURETY COMPANY OF NEW YORK, RESPONDENT, IN OPPOSITION

I. INTRODUCTORY STATEMENT

Because this is the third time Petitioners have sought to have this Court review proceedings in which criminal

usury penalties were assessed against them, and because of the multitude of prior appeals and petitions for writ of certiorari in both the State and Federal judiciary system, it seems appropriate and advisable to first summarize the litigation which has taken place over the last nine years.

This action was commenced in the State Courts of Florida in 1957 by the joint complaint of the Pan American Bank of Miami, hereinafter referred to as "State Bank," and the Coral Gables First National Bank, hereinafter referred to as "National Bank," seeking to foreclose three mortgages made by Constructors of Florida, Inc., hereinafter referred to as "Constructors," and to impose liability for any deficiency from the American Surety Company of New York, hereinafter referred to as "Surety." Both Constructors and Surety counterclaimed, contending that Banks had violated the usury laws of Florida and of the United States. The evidence proved that Petitioner-State Bank, in an attempt to avoid the usury penalties provided by the Laws of the State of Florida, made a criminally usurious loan using as a conduit its agent, National Bank. Both banks were owned and controlled by the same family interests and had a majority of interlocking officers and directors. The device by which usury was perpetrated was that of requiring the borrower to leave on deposit with the National Bank such substantial funds that the interest paid, when computed upon the basis of the funds actually available to the borrower, was in excess of fifty (50%) percent. The State Court Chancellor, after finding the facts to be as stated above, interposed against both Banks usury penalties under State Law, finding them guilty of having exacted criminal usury. The Florida District Court, in 1960, 119 So. 2d 741, affirmed the usury penalty imposed against the State Bank, but modified the

usury penalty imposed against the National Bank to comply with Federal law (12 U.S.C. §§ 85, 86). Thereafter Petitions for Writ of Certiorari were denied several times by the Supreme Court of Florida and twice by this Court. (1961, 365 U.S. 811, 5 L. Ed.2d 691, 81 Sup. Ct. 690; 1962, 369 U.S. 810, 7 L. Ed. 2d 612, 82 Sup. Ct. 687.)

In the meantime, in October of 1957, an Involuntary Petition in Bankruptcy had been filed against Constructors, and these bankruptcy proceedings converted to Reorganization proceedings under Chapter X; but both the Receiver in the bankruptcy proceedings and the Trustee in the Reorganization proceedings had been authorized by the United States District Court to continue the State Court usury litigation, and had participated not only in the trial but also in the several appeals and in responses to the several Petitions for Writ of Certiorari. In April of 1961, after having been unsuccessful in the State Courts, the Petitioner-Banks sought to have the Reorganization Court restrain enforcement of the State Court judgment. The Reorganization Court denied the requested injunction, allowing the State Court judgments to be collected by the Reorganization Trustee. Petitioner-Banks then sought to have the United States Court of Appeals for the Fifth Circuit overrule the Reorganization Court, contending that the State Court was without jurisdiction to proceed and that the Reorganization Court was without jurisdiction to allow the continuation of the State Court proceedings. The United States Court of Appeals for the Fifth Circuit affirmed the Reorganization Court (299 F.2d 736). Petitioners did not seek certiorari or otherwise appeal this first Opinion of the Fifth Circuit. Instead, again upon the legal theory that the State Court was without jurisdiction, Petitioners sought to have the Reorganization Court enter an Order directing the Trustee to return to Petitioners the

funds which he had collected by executing on the State Court judgment. The Reorganization Court refused to enter the requested Order and Petitioners again appealed to the United States Court of Appeals for the Fifth Circuit. Holding the matter to be res judicata by reason of their prior Opinion, as well as the prior Opinions of the State Appellate Courts, the United States Court of Appeals for the Fifth Circuit (349 F.2d 595) affirmed the Chancellor's refusal to direct the repayment of these monies to Banks.

The instant Petition for Writ of Certiorari is ostensibly addressed to this second decision of the Fifth Circuit; but, in reality, seeks to have this Court reverse the usury penalties imposed by the State Court many years ago, notwithstanding this Court's refusal, on two prior occasions, to review the State Court proceedings.

In the discussion which follows, emphasis which has been supplied has been indicated by dark type.

II. THE OPINIONS BELOW

The 1965 Opinion of the United States Court of Appeals for the Fifth Circuit, which the Petition for Writ of Certiorari ostensibly seeks to have this Court review, is reported at 349 F.2d 595. However, Petitioners' prime purpose is to have this Court in some way upset proceedings in the State Courts of Florida, notwithstanding that this Court has twice previously denied Petitions for Writ of Certiorari filed by these Petitioners and directed to the Florida State Court determinations (1961, 365 U.S. 811, 5 L. Ed. 2d 691, 81 Sup. Ct. 690; 1962, 369 U.S. 810, 7 L. Ed. 2d 612, 82 Sup. Ct. 687), and notwithstanding the prior refusal of the United States District Court and the United States Court of Appeals for the Fifth Circuit to interfere with the State Court proceedings.

The Partial Final Decree of the Trial Court is unreported, but is set forth in the Record at R. 330, and the Order Amending the Partial Final Decree of the Trial Court is set forth in the Record at R. 346. The first Opinion of the District Court of Appeal of Florida, Third District, rendered March 22, 1960, is reported at 119 So. 2d 741 (R. 350 - R. 368). The State Court Order and Judgment on the Mandate, dated April 14, 1961, is not officially reported, but a copy is set forth in the Record at R. 371 - R. 376. The refusal of the United States District Court, sitting as a Reorganization Court, to restrain execution on the State Court Judgment is unreported; but the Opinion of the United States Court of Appeals for the Fifth Circuit, sustaining this refusal, is reported at 299 F.2d 736. The Order of the United States District Court refusing to direct repayment to Petitioners of the usury penalties collected by the Trustee is unreported, but a copy of the Court's Opinion is set forth in the Record at R. 411, and of the Court's Order at R. 426. The Opinion of the United States Court of Appeals for the Fifth Circuit, affirming the District Court's refusal to direct repayment of the funds, is reported at 349 F.2d 595. In addition, a copy thereof is appended to the Petition as Appendix A.

III. JURISDICTION

The claimed jurisdictional pre-requisites set forth in the Petition are *Title 11 U.S.C. Section 47* and *Section 24* of the *National Banking Act*. However, Petitioners fail to explain any basis by which this Court could or should reverse a second decision of the United States Court of Appeals for the Fifth Circuit, rendered in 1965, when that decision merely held a previous decision of the same Court, rendered in 1962, to be res judicata.

IV. QUESTIONS PRESENTED

The questions stated by the Petition in a thirteen page narrative, beginning at page 3 and concluding at page 16 of the Petition, and summarized on pages 16 - 19 thereof, all take issue with the State Court determinations. In our opinion the only question before the Court is the correctness of the Opinion of the United States Court of Appeals for the Fifth Circuit, rendered in 1965 (349 F.2d 595), which held that all issues presented by Petitioners on their second appeal to that Court previously had been presented to and decided not only by the State Courts, but also the Fifth Circuit in its prior Opinion, rendered in 1962 (299 F.2d 736); and that such prior Opinion was res judicata.

V. STATEMENT OF THE CASE

This matter is before this Court on the Petition of The Coral Gables First National Bank and Pan American Bank of Miami for Writ of Certiorari to the United States Court of Appeals, Fifth Circuit, seeking review of an Opinion of that Court, which sustained an order of the United States District Court, Southern District of Florida, overruling a motion of Petitioners for an order directing a trustee in reorganization to pay over to Petitioners certain monies recovered by the trustee from Petitioners as a result of an action tried in the State Court with the permission of the Reorganization Court. This is the third appearance before this Court of the proceedings involving the reorganization of Constructors of Florida, Inc., this Court having denied two prior Petitions for Writ of Certiorari (1961, 365 U.S. 811, 5 L. Ed. 2d 691, 81 Sup. Ct. 690; 1962, 369 U.S. 810, 7 L. Ed. 2d 612, 82 Sup. Ct. 687), both of which sought essentially the same relief as that sought by the instant Petition; that is, a determination that the State Court was

without jurisdiction to entertain the proceedings in that Court, which held the two banks to have been joint adventurers, agent and principal each for the other, and guilty of exacting criminal usury.

In addition to their two prior appearances before this Court, and the numerous appellate procedures within the State Court system, Petitioners sought the same relief in a prior appeal to the United States Court of Appeals, Fifth Circuit (299 F.2d 736) from which they did not appeal or seek certiorari. It is difficult to improve upon the summary of the previous litigation set out by the Fifth Circuit in its prior Opinion (299 F.2d 736, Pages 737-739):

> "The Debtor is Constructors of Florida, Inc. The story is long and starts in 1957. The Banks had made three loans to Constructors secured by separate mortgages. Alleging that one of the notes was in default, the Banks filed foreclosure proceedings in the Florida State Court in January, 1957. That proceeding soon became a complicated one. The part we are concerned with is the counterclaim by Constructors against the Bank for usury and related penalties. That involved also related questions whether the Banks were entitled to satisfy any judgments for usury penalties by offsets against the indebtedness and **whether because of usurious conduct and the clean hands doctrine the Banks had in effect forfeited the security of the mortgage.** The latter aspect posed a controversy between the Banks and the Surety on the major municipal contract of Constructors. **These disputes are what the parties refer to as the 'first phase' of the Bank litigation.** Many more complicated claims and counterclaims were presented in the 'second phase,' but we need not be concerned with them.
>
> "At this stage enters the United States District Court. An involuntary petition in bankruptcy was filed against Constructors in October, 1957. Shortly thereafter the Bankruptcy Court appointed a Receiver and by suit-

able orders the Receiver was authorized to continue the Florida State Court litigation. There was no objection in the bankruptcy proceedings to that order at that time. Nor is it now contended that at that time such order was either improvident or beyond the Court's power. The Receiver and his counsel appeared and actively participated in the State Court proceeding.

"In June, 1958, a judgment was rendered by the Florida State Court casting the Banks for substantial usury penalties, denying enforcement to the Banks' mortgages because of the clean hands doctrine and giving priority to the Surety as between the Banks and the Surety. Some other relief to other claimants and counterclaimants was denied. Appeals were taken, apparently by all parties, from that judgment to the Florida Court of Appeals.

"In the meantime, without there ever having been an adjudication of bankruptcy, a Petition for Reorganization under Chapter X was filed in November, 1958. The same person who had previously served as Receiver in the bankruptcy proceeding was shortly appointed as Trustee in the Reorganization Proceeding. An order was entered by the Bankruptcy Court in that proceeding authorizing the Trustee to continue the State Court litigation.

"In December, 1958, a proposed Plan of Reorganization was filed. This Plan contained detailed, express provisions concerning the continuation, outcome and effect of the State Court litigation.

"In February, 1959, the Bankruptcy Court entered an order authorizing the Trustee to continue the State Court litigation. It bears emphasis that this approval expressly provided that no execution should issue on any such State Court judgment or orders without further order of the Bankruptcy Court. The Banks, after some intervening orders, were recognized as having certain tentative voting rights on the Plan. The Banks along with all other creditors approved the

proposed Plan and in March, 1959, the Plan was approved. As later pointed out in detail, **this Plan made elaborate provision for the continuation and prosecution of the State Court proceedings and the effect of judgments to be rendered in it.**

"Shortly thereafter and on March 22, 1960, the Florida State Court of Appeals rendered its decision which affirmed the judgment in part but reversed it and modified it in other substantial particulars. The Banks, unsatisfied with this decision of the Florida Court of Appeals, unsuccessfully pursued further review in the Supreme Court of Florida and in the United States Supreme Court.

"After all of these appeals were fruitless, the mandate was received back in the Florida State Trial Court by early April, 1961. It was at this point and at this place that the Banks for the first time ever made (or now make) an objection that the Florida State Courts were without jurisdiction to proceed to enter a judgment pursuant to the mandate, and the Bankruptcy Court was without jurisdiction to permit the continuation of State Court proceedings. This plea was overruled in the State Court. **With the jurisdictional objection overruled, the State Trial Court proceeded to enter a final judgment as to 'the first phase,' the broad effect of which was to hold the Banks liable for a substantial sum for usury penalties, deny enforcement of the Banks' security, and presumably subordinate the Banks as creditors to the position of the Surety.**

"Unsuccessful in the State Courts, the Banks now turned to the Bankruptcy Court. On April 10, 1961, the Banks sought an injunction prohibiting further State Court proceedings and any enforcement of, or execution on, the State Court judgment. After a hearing the Bankruptcy Court denied this broad prayer for injunction and modified its prior order of February, 1959 (see note 4, supra), to permit execution on the judgment but only insofar as the Trustee in the Re-

organization Proceeding was concerned. Execution for this limited purpose being permitted by the Bankruptcy Court, the State Court judgment was enforced against the Banks on April 18, 1961. Pursuant to that execution, large sums were paid over by the Banks to the Trustee who now holds them subject to further orders of the Bankruptcy Court. This was followed shortly on May 1, 1961, by the Banks' appeal to this Court.

"At the time the Banks, in April, 1961, contended for the first time in the Bankruptcy Court that the State Court proceedings were beyond the power of that Court or the power of the Bankruptcy Court to permit, the relief sought was not modest in nature. In effect the Banks contended that at least beginning with the time the Florida Court of Appeals modified the judgment in March, 1960, the Bankruptcy Court had no power to permit in the State Courts the further continuation of litigation having direct bearing on the reorganization estate. That being so, the argument then went on, the whole question of usury penalties has to be retried from beginning to end. In short, all of this effort for the past 4 1/2 years is for nought.

"To sugar-coat this bitter pill, the Banks insist that the Florida Courts committed critical and substantial errors in the application of the National Banking Act as to usury penalties. But this is unavailing since it must be recognized that State Courts are competent to adjudicate cases arising under, or affected by, that Federal law. The fact—asserted by the Banks—that the Florida Courts erred would not give a Federal District Court any power to 'correct' that error by a review or, worse, a prohibitory injunction. See 28 U.S.C.A. § 2283. If the Bankruptcy Court had the power to permit the Florida Court to continue, and if the Florida Court had the power to continue that litigation, then that power included the power to err. **And, so long as any such action by the Florida State Court did not encroach upon the exclusive jurisdiction**

> **of the Bankruptcy Court or otherwise on an exclusive Federal domain, correction of any error—the occurrence of which we do not begin to imply—would have to come through regular processes of the Florida system."**

The Fifth Circuit having held these questions to have been properly submitted to the State Court and that the Reorganization Court's refusal to grant the injunction requested by Banks was proper, the Trustee then filed additional objections to the claim of Banks (R. 225), noting in his Memorandum (R. 228) that the claim of Banks (R. 264) was based solely upon the State Court litigation authorized to be continued by the Reorganization Court. The Banks moved for an order directing the Trustee to pay to them the monies previously recovered by him as a result of the State Court action, reasserting claimed lack of jurisdiction on the part of the State Court. The United States District Court for the Southern District of Florida, holding that the Banks were barred by res judicata from again attacking the jurisdiction of the State Court, denied the motion of the Banks, and sustained the objections of the Trustee. Banks, appealing to the Fifth Circuit, again contended that the State Court had no jurisdiction. The Fifth Circuit, overruling this contention of Banks, said (349 F.2d 595, 599, 600):

> "The Banks contend that the Circuit Court of Dade County, Florida, had no jurisdiction to determine the issue of usury committed by a national bank raised by Constructor's counterclaim. We are of the opinion, however, that that question has been finally adjudicated and conclusively settled as between these parties by previous adjudications not now open to attack by the Banks.
>
> * * * * *
>
> "The action brought by the Banks for an injunction prohibiting further State Court proceedings which

was the subject of the earlier appeal to this court directly presented on the merits the issues of whether the Bankruptcy Court had the power to direct the continuance of the State Court litigation and whether the Circuit Court of Dade County, Florida, had the power to determine the claims between Constructors and the Banks. The order of the Bankruptcy Court denying such injunctive relief and permitting execution by the Trustee on the State Court judgment, after affirmance by this court conclusively settled those issues between the parties. Such issues cannot again be litigated on the petition of the Banks for an order directing the Trustee to pay back the funds obtained through execution on the State Court judgment. Although the demand is different, the issues are identical.

"Furthermore, the Banks are also concluded by the issues adjudicated by the State Court and may not relitigate those issues in this proceeding. The claim of the Banks that the State Court was without jurisdiction to adjudicate the issues of usury and the right to foreclose the mortgages and relative security rights of the Banks and the Surety to the property described in the mortgages is not well taken. The determination by a court of general jurisdiction of its own jurisdiction is conclusive as to the parties and their privies."

A Petition for Rehearing was filed with the Fifth Circuit by Petitioner-Banks and was promptly denied. The Reorganization Judge shortly thereafter, on September 21, 1965 (Trustee's Appendix-A), entered Judgment on the Mandate. Petitioners have not superseded or attempted to stay the operation of this judgment. Neither have they appealed therefrom; and the appeal period has expired. As the Trustee has indicated, the conclusion of the Reorganization proceedings, delayed six (6) years by Banks' numerous appeals and petitions for writ of certiorari, is in order. The instant Petition, directed to the second Opinion of the Fifth Circuit, was not filed until November 29, 1965,

more than sixty (60) days after the Order and Judgment on Mandate was entered by the District Court.

VI. SUMMARY OF ARGUMENT IN OPPOSITION

In opposition, Respondent contends that *the Petition is out of time, without merit, and dilatory.* It actually seeks review of a decision of the State Court of Florida which became final, at the latest, when this Court on March 5, 1962 (369 U.S. 810, 7 L. Ed. 2d 612, 82 Sup. Ct. 687), for the second time refused the application of Petitioners for a Writ of Certiorari to the State Courts of Florida.

The decision below is correct. The second Opinion of the United States Court of Appeals for the Fifth Circuit, to which the Petition is ostensibly directed, held its prior Opinion (299 F.2d 736), which Petitioners did not seek to have reviewed, to have conclusively settled the issues of whether the Bankruptcy Court had the power to direct the continuance of the State Court litigation, and whether the State Court had the power to determine the claims between Constructors and the Banks. Petitioners have shown no basis for rejecting this sound doctrine of res judicata.

A State Court judgment, determining the State Court to have jurisdiction over the subject matter of the litigation, when entered after an actually contested issue as to the jurisdiction, is conclusive between the parties and their privies in a subsequent Federal Court action. The United States Court of Appeals for the Fifth Circuit was correct in so holding. *Forsyth* v. *Hammond,* (1897) 166 U.S. 506, 515, 41 L. Ed. 1095, 1098, 17 Sup. Ct. 665; *Stoll* v. *Gottlieb,* (1938) 305 U.S. 165, 173, 83 L. Ed. 104, 109, 59 Sup. Ct. 134; *Durfee* v. *Duke,* (1963) 375 U.S. 106, 11 L. Ed. 2d 186, 84 Sup. Ct. 242.

The State Court correctly determined the quantum of usury penalties. The State Court Chancellor, in determining the double usury penalties described by the *National Banking Act,* adopted the figures by Banks' own audit; and there is no factual basis for Banks to contend to the contrary.

The State Court had jurisdiction to determine the usury claim against the National Bank. John R. Alley & Co. v. Federal National Bank of Shawnee, (10 Cir., 1942) 124 F.2d 995.

There is no Federal question as to the State Bank. The usury penalties against the State Bank were assessed by the State Court pursuant to State law; and there is no contention that this action of the State Court was in any wise repugnant to any Federal Statute or any provisions of the *Constitution of the United States.*

The Petition fails to properly invoke the jurisdiction of the Court or to show any important question of Federal law. Neither the alleged Constitutional question nor the alleged erroneous interpretation of the *National Banking Act* has been properly raised or preserved. Further, Petitioners have failed to show, as required by *Rule 19* of the *Rules of this Court,* any "special and important reasons" why this Court should grant the review sought.

There is no conflict of decisions. Notwithstanding Petitioners' contentions to the contrary, the Opinion sought to be reviewed in no way conflicts with *Durfee* v. *Duke, supra; Kalb* v. *Feuerstein,* (1940) 308 U.S. 433, 84 L. Ed. 370, 60 Sup. Ct. 343; *United States* v. *United States F. & G. Co.,* (1940) 309 U.S. 506, 84 L. Ed. 894, 60 Sup. Ct. 653; or *Gondeck* v. *Pan American World Airways,* (1965) ..... U.S. ....., 15 L. Ed. 2d 21, 86 Sup. Ct. .....

The Petition should be denied.

VII. ARGUMENT IN OPPOSITION

A. The Petition Is Out of Time, Without Merit, and Dilatory.

It is the contention of Respondent that the Petition herein is not timely. It actually seeks review of a decision of the State Court of Florida which became final, at the latest, when this Court, on March 5, 1962, (369 U.S. 810, 7 L. Ed. 2d 612, 82 Sup. Ct. 687), denied the second Petition for Writ of Certiorari lodged by Petitioners in this Court seeking review of such State Court proceedings.

The instant Petition purports to request review of a decision of the United States Court of Appeals for the Fifth Circuit; but the questions presented by the Petition, as summarized on Pages 16 - 19 thereof, are all addressed to alleged error on the part of the State Court. Requested review of this State Court decision has been twice denied by this Court (1961, 365 U.S. 811, 5 L. Ed. 2d 691, 81 Sup. Ct. 690; 1962, 369 U.S. 810, 7 L. Ed. 2d 612, 82 Sup. Ct. 687). The United States Court of Appeals for the Fifth Circuit determined in 1962 (299 F.2d 736) that the United States District Court had the authority to delegate this matter to the State Court, and that the State Court had jurisdiction to decide it. This decision of the United States Court of Appeals for the Fifth Circuit has long since become final without any attempt on the part of Petitioners to seek review in this Court. The United States Court of Appeals for the Fifth Circuit has now reiterated and reaffirmed its previous decision that the State Court had jurisdiction, saying (349 F.2d 595, 600):

> "* * * Such issues cannot again be litigated on the petition of the Banks for an order directing the Trustee to pay back the funds obtained through execution

> on the State Court judgment. Although the demand is different, the issues are identical."

This Petition for Writ of Certiorari, though in the guise of requested review of this latter Opinion of the United States Court of Appeals for the Fifth Circuit, in reality is a third attempt to have this Court review the State Court decision. It cannot possibly be timely. It is patently without merit, dilatory, and should be denied.

B. The Decision Below Is Correct.

The Opinion of the United States Court of Appeals for the Fifth Circuit (349 F.2d 595) which Petitioners now seek to have this Court review, was bottomed upon two legal theories: The doctrine of res judicata and the effect of the Reorganization Plan. As to the doctrine of res judicata, the Fifth Circuit noted that its prior Opinion (299 F.2d 736) which Petitioners did not seek to have reviewed, conclusively settled the issues of whether the Bankruptcy Court had the power to direct the continuance of the State Court litigation, and whether the State Court had the power to determine the claims between Constructors and the Banks. Hence, those issues could not be re-examined by the Fifth Circuit even though they were raised by Petitioners in a different fashion.

The Petitioners have shown no basis for rejecting this doctrine of res judicata so soundly applied by the Fifth Circuit in the Opinion which Petitioners would now have this Court review. This Court need not inquire—indeed it should not inquire—into the correctness of the first Opinion of the Fifth Circuit. Petitioners did not seek review of that Opinion. The only matter before this Court is the question of whether or not the Fifth Circuit was correct in saying that the issues presented to it on the second appearance on this matter before the Fifth Circuit were

the same as those which it had previously determined. There is no showing of any differences in the issues; indeed Petitioners tacitly admit that they are the same. This Court will not allow itself to be imposed upon to review an Opinion rendered in 1962 through the device of a purported review of an Opinion rendered in 1965. We respectfully suggest that the Petition is without merit, frivolous, imposed solely for the purpose of delay; and that the Court may wish to take note of the propensity of one of Banks' counsel for similar frivolous and dilatory procedures, as evidenced not only by the two prior appearances of this matter before this Court, and the numerous other appellate procedures indulged in this matter, but also by *Woolley* v. *Eastern Air Lines, Inc.* (5 Cir., 1960), 273 F.2d 615.

As to the Reorganization Plan, the United States Court of Appeals for the Fifth Circuit said (349 F.2d 595, 601):

> "Also, Article IV of the Reorganization Plan, *supra*, clearly contemplated that the validity of the claimed security of Surety and the Banks would be left for determination by the State Court in the Bank litigation. Not only did the Banks fail to appeal from the order confirming that plan, but also they affirmatively approved and accepted the plan and consented to its confirmation by the court.
>
> "11 U.S.C.A. Sec. 624, provides in part as follows:
>
> " 'Upon confirmation of a plan—
>
> " '(1) The plan and its provisions shall be binding upon the debtor, upon every other corporation issuing securities or acquiring property under the plan, and upon all creditors and stockholders, whether or not such creditors and stockholders are affected by the plan or have accepted it or have

filed proofs of their claims or interests and whether or not their claims or interests have been scheduled or allowed or are allowable.'

"The Banks are bound by the provisions of the reorganization plan and since the confirmation order was not appealed, the determination by the Bankruptcy Court in its confirmation order pursuant to 11 U.S. C.A. Sec. 621 that the plan complied with subchapter X of Chapter X of the Bankruptcy Act and that the plan was fair and equitable and feasible is not now open to attack."

Nowhere in their third voluminous Petition for Writ of Certiorari do Petitioners argue with the above quoted portion of the Opinion which they seek to have this Court review. Certainly, there is no error in this portion of the Opinion; and this portion alone would sustain the conclusion. For any Court to have held otherwise would have been to violate *Section 229 (c) of the Act of Congress Relating to Bankruptcy.* The United States Court of Appeals for the Fifth Circuit was correct. Accordingly, the Petition for Writ of Certiorari should be denied. This Court has consistently adhered to the principle that it will not decide a constitutional issue or a statutory interpretation issue if the judgment of the lower Court can be sustained upon other grounds. Here, Petitioners affirmatively approved and accepted the Reorganization Plan, which required the determination of the validity and relative priority of the conflicting claims of Surety and Banks by the State Court. The State Court usury litigation so strenuously objected to by Petitioners is the same litigation provided for by the Reorganization Plan, and defined therein as follows (R. 26):

"BANK LITIGATION: That certain litigation entitled Coral Gables First National Bank, et al., v. Con-

structors of Florida, et al., in the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida, in Chancery, case number 205613, together with all appellate or review proceedings which have arisen or may hereafter arise therefrom."

The said Plan, which was approved by the District Court on December 9, 1958, specifically directs the continuation of said State Court litigation, in Article XIX, paragraph H, thereof (R. 48-49):

"H. **Provisions as to further Proceedings in Bank Litigation.** Nothing contained in this Plan shall be deemed in any way to impair or to interfere with further proceedings in Bank Litigation, or to impair, change or waive any rights whatsoever by any party therein asserted, it being one of the intents and purposes of this Plan to facilitate further proceedings therein; * * * and New Stockholders, by their participation in this Plan, covenant and agree that Debtor shall continue to employ such counsel under such contract, and that Debtor shall use its best efforts to see that Bank Litigation is successfully prosecuted. To further facilitate such continued proceedings in Bank Litigation, the entry of the Court's order approving this Plan shall be deemed to authorize substitution of Trustee for Receiver in all of said proceedings, and shall further authorize Trustee to continue, at the expense of Trustee's Fund A, his participation in the first phase of said Bank Litigation. * * *"

The Order of the District Court classifying creditors and stockholders of Debtor (R. 86), which was entered February 2, 1959, filed February 3, 1959, and distributed to all interested parties, divides the various creditors into three categories, namely, secured claims, priority unsecured claims and unsecured non-priority claims. As to secured claims it defines Class I as follows (R. 86-87):

"* * * The Claim of American Surety Company of New York or the claim of Pan American Bank of

Miami and Coral Gables First National Bank, against the debtor, to the extent of the value of the Debtor's property encumbered to secure such claim, it being understood that whether either of said claimants shall be entitled to be considered secured, and the relative priority of their said claims, if valid, will be dependent upon the final outcome of Bank Litigation. * * *"

This classification was adopted by the Plan for the Reorganization of Constructors of Florida, Inc., which provides that the amount, status and relative priority of the conflicting claims of The Coral Gables First National Bank and the American Surety Company of New York is to be determined by the final outcome of the State Court litigation. Article IV, Section A, thereof (R. 30) provides:

"A. Secured Claims. Class I—The claim of American Surety Company of New York, Or the claim of Pan American Bank of Miami and Coral Gables First National Bank, against the Debtor, to the extent of the value of the Debtor's property encumbered to secure such claim, it being understood that whether either of said claimants shall be entitled to be considered secured, and the relative priority of their said claims, if valid, will be dependent upon the final outcome of Bank Litigation; * * *"

The Coral Gables First National Bank filed, in the Reorganization proceedings, its approval and acceptance of said Plan, by a document entitled "Consent" stating (R. 106):

"Comes now Coral Gables First National Bank and approves and accepts the plan of reorganization, and consents to the Court entering an order confirming the plan of reorganization."

After the filing of the aforegoing Consent, and pursuant to the applicable provisions of the *Act of Congress*

Relating to Bankruptcy, The United States District Court on March 9, 1959, confirmed the Plan (R. 107-118). This confirmation Order was not appealed. In reliance on such confirmation the new stockholders, as defined in the Plan, paid to Trustee the sum of $212,500.00 and otherwise performed in accordance with said Plan. Likewise, Surety and other creditors so changed their position in reliance upon the Plan of Debtor as to make it now impossible to place them again in their original status.

On April 9, 1959, pursuant to *Section 229(a) of the Act of Congress Relating to Bankruptcy*, (11 U.S.C. § 629a) the District Court entered its order determining the Plan for Reorganization of Constructors of Florida, Inc., to have been substantially consummated (R. 119-127). *Section 229(c) of the Act of Congress Relating to Bankruptcy* (11 U.S.C. § 629c) prohibits the modification of a plan for reorganization of a debtor after an order has been entered decreeing the plan to have been substantially consummated.

It cannot be disputed that the Plan contemplated and required the completion of the State Court Litigation and that such State Court Litigation was to be determinative of the validity and relative priority of the conflicting claims of lien of Banks and Surety.

C. A State Court Judgment, Determining the State Court to Have Jurisdiction over the Subject Matter of the Litigation, When Entered After an Actually Contested Issue As to the Jurisdiction, Is Conclusive Between the Parties and Their Privies in a Subsequent Federal Court Action.

As we have indicated in part B of our Argument, commencing at page 16, we strongly believe that the Petition takes issue not with the second Opinion of the Fifth Circuit (1965, 349 F.2d 595) to which it is ostensibly addressed, but rather with its first Opinion (1962, 299 F.2d

736) and with the State Court judgments. Banks, with commendable candor so unusual in their argument, admit that they have, at every stage of both the State and Federal Court proceedings involved in this complex litigation since April of 1961, continuously objected that the State Court was without jurisdiction to proceed, and the Bankruptcy Court was without jurisdiction to permit the continuation of the State Court proceedings. Notwithstanding all of the previous adverse decisions at both State and Federal levels, they urge that the matter is not res judicata. Even the first Opinion of the Fifth Circuit, they rashly contend, is erroneous and subject to change by this Court.

Banks would apparently have this Court overrule its decisions running back as early as 1897. In *Forsyth* v. *Hammond, supra,* plaintiff invoked the jurisdiction of the Supreme Court of Indiana, challenging the decree of the lower Indiana Court for error and also for lack of jurisdiction on the part of the lower Indiana Court. The Supreme Court of Indiana upheld both the decision and the jurisdiction of the lower Indiana Court. Immediately thereafter plaintiff filed, in the District Court of the United States, a petition for injunction contending that the State Court was without jurisdiction. The District Court of the United States refused the injunction; and the United States Circuit Court of Appeals reversed the District Court. On certiorari this Court held the prior decision in the Supreme Court of Indiana to be res judicata as to the jurisdictional question, noting that plaintiff had invoked the jurisdiction of the Supreme Court of Indiana and had there challenged the decisions of the lower Indiana State Court both for error and for lack of jurisdiction. This Court said:

> "* * * The questions both of error and of jurisdiction were certainly judicial in their nature and questions within the undoubted cognizance of the supreme court.

She voluntarily sought its judgment. Can she, after its decision, be heard in any other tribunal to collaterally deny the validity thereof? Does not the principle of res judicata apply in all its force? Having litigated a question in one competent tribunal and been defeated, can she litigate the same question in another tribunal, acting independently, and having no appellate jurisdiction? The question is not whether the judgment of the supreme court would be conclusive as to the question involved in another action between other parties, but whether it is not binding between the same parties in that or any other forum. The principles controlling the doctrine of res judicata have been so often announced, and are so universally recognized, that the citation of authorities is scarcely necessary. Though the form and causes of action be different, a decision by a court of competent jurisdiction in respect to any essential fact or question in the one action is conclusive between the parties in all subsequent actions."

In *Stoll* v. *Gottlieb, supra,* where the question was the binding effect as res judicata of a previous decision in which an actual contest as to jurisdiction had been determined, this Court said (at 172, 173):

"* * * We see no reason why a court, in the absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the court making the earlier determination on an actual contest over jurisdiction between the parties, did have jurisdiction of the subject matter of the litigation.

* * * * *

"Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there ren-

dered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first.

"That a former judgment in a state court is conclusive between the parties and their privies in a Federal court when entered upon an actually contested issue as to the jurisdiction of the court over the subject matter of the litigation, has been determined by this Court in Forsyth v. Hammond."

This doctrine has been reaffirmed by this Court as recently as in 1963 in *Durfee* v. *Duke, supra,* where the question of jurisdiction of a Nebraska State Court over the subject matter was dependent solely upon the question of whether or not the land in controversy was in Nebraska and this, in turn, depended entirely upon a factual question—whether a shift in the course of the Missouri River was caused by avulsion or accretion. The Nebraska Court found the land to be in Nebraska and the Supreme Court of Nebraska affirmed. The defendant, who lost in the Nebraska suit, two months later filed a suit in Missouri, against the plaintiffs in the Nebraska suit, alleging the land to be in Missouri. The suit was removed to a Federal District Court which, after hearing evidence, expressed the view that the land was in Missouri; but that the Nebraska court decision was res judicata and therefore binding upon the Federal District Court. The Court of Appeals reversed the Federal District Court, holding that it was not required to give full faith and credit to the Nebraska State Court judgment since the Federal District Court had found the land to be in Missouri and the Nebraska State Court would have no jurisdiction over land in Missouri. This Court reversed the Court of Appeals, holding that the Federal District Court was correct in treating the Nebraska decision as res judicata, and quoted, from *Stoll* v. *Gottlieb,*

supra, most of the language which we have reproduced above.

We most earnestly and respectfully contend that *Forsyth* v. *Hammond, supra, Stoll* v. *Gottlieb, supra,* and *Durfee* v. *Duke, supra,* conclusively require the rejection of any possible contention of Banks, regardless of the correctness of the prior decisions of the Florida trial Court, the Florida District Court of Appeal, the Florida Supreme Court, the United States District Court for the Southern District of Florida, and the first Opinion of the United States Court of Appeals for the Fifth Circuit. It cannot be doubted that the jurisdictional question was extensively urged, adequately argued and decided adversely to Banks not only in the State Trial Court and Federal Trial Court, but also throughout all of the extensive appellate procedures in both the State and Federal judicial systems, culminating in the first Opinion of the Fifth Circuit (1962, 299 F.2d 736), which Petitioners did not seek to have reviewed.

The State Court judgment, which determined the State Court to have jurisdiction over the subject matter of the litigation and which was entered after an actually contested issue of jurisdiction, was conclusive between the parties in the subsequent Federal Court action. The Fifth Circuit was preeminently correct when it so held in 1962 (299 F.2d 736). It was equally as correct, when in 1965 (349 F.2d 595), it held its 1962 Opinion to be res judicata.

The Petition should be denied.

D. The State Court Correctly Determined the Quantum of Usury Penalties.

Petitioners have continuously urged in all prior appellate courts, and now attempt to urge in this Court, that

the State Court incorrectly determined the amount of interest paid to Banks; and hence was incorrect in its calculation as to the quantum of usury penalties. Every subsequent Court, Petitioners complain, has made the same mistake.

It is, of course, unnecessary to support the State Court decision at this late stage of the matter. However, we feel that this Court should know that there was no error on the part of the State Court, and that Petitioners' complaints in this regard are without merit. The Record in this Court is sufficient to completely discredit all such contentions. The State Court Chancellor adopted the figures presented by Banks' own audit. His Partial Final Decree so states, referring as it does to plaintiffs' Exhibit 47. The Chancellor said (R. 347):

> "* * * Accordingly, plaintiff, Coral Gables First National Bank, is liable either to Constructors of Florida, Inc. or to its Receiver, under the terms of the Federal Banking Code (12 U.S.C.A. Sec. 86), and plaintiff, Pan American Bank of Miami, is liable either to Constructors of Florida, Inc. or to its Receiver, under the terms of Sec. 687.07, Florida Statutes, 1957, as follows:
>
> "(a) Liability of Coral Gables First National Bank
>
> (1) For double the interest collected prior to March 20, 1957, in the amount of $49,855.44, as per Schedule 1, Pentland, Purvis, Keller & Co. audit, Plaintiffs' Exhibit No. 47 ..... $ 99,710.88
>
> (2) For double the interest collected subsequent to March 20, 1957, in the amount of $5,370.35, per note jackets covering the renewal con-

tract note, Defendants' Exhibits I and J 10,740.70

$110,451.58

Less amount credited to principal on re-negotiation 35,584.06

Total due by Coral Gables First National Bank ..... $ 74,867.52

"(b) Liability of Pan American Bank of Miami

(1) For the principal and interest paid prior to March 20, 1957, as per Schedule 1, Pentland, Purvis, Keller & Co. audit, Plaintiffs' Exhibit No. 47 ..... $194,156.11

(2) For the principal paid subsequent to March 20, 1957, as per note jackets (Defendants' Exhibits I and J) covering the portions of the renewal contract note ostensibly held by each of the Plaintiffs and proved by the following computation:

Balance due as of March 20, 1957 ..... $218,275.27

Less, balance remaining due 151,802.46

$ 66,472.81

(3) For the interest paid subsequent to March 20, 1957, as per the same note jackets (Defendants' Exhibits I and J) 5,370.35

Total principal and interest due by Pan American Bank of Miami (as per the above and as per testimony of Esten A. Ulmer, C.P.A., ending at Tr. 774) $265,999.27"

These same calculations were the basis of the Chancellor's Order and Judgment on Mandate, entered after this Court had refused to entertain Banks' first Petition for Writ of Certiorari (1961, 365 U.S. 811, 5 L. Ed. 2d 691, 81 Sup. Ct. 690), which contains exactly the same figures, saying (R. 203):

> "And it is further Ordered, Adjudged and Decreed:
>
> "I. That John Nicholas, as Trustee for Constructors of Florida, Inc., on his counterclaim, have and take from the plaintiff, Coral Gables First National Bank, the principal sum of Seventy-Four Thousand Eight Hundred Sixty-Seven Dollars and Fifty-two Cents ($74,867.52), with interest as provided by law from July 2, 1958, for which sums let execution immediately issue.
>
> "II. That John Nicholas, as Trustee for Constructors of Florida, Inc., on his counterclaim, have and take from the plaintiff, Pan American Bank of Miami, the principal sum of Two Hundred Sixty-Five Thousand Nine Hundred Ninety-Nine Dollars and Twenty Seven Cents ($265,999.27), with interest as provided by law from July 2, 1958, for which sums let execution immediately issue."

When Petitioners now attempt to infer critical errors on the part of the State Court, when in fact the State Court's calculations were based upon the Banks' own audit—and this notwithstanding our having noted this fiction at pages 31 and 32 of our Brief for Respondents in Opposition in Case No. 559 before this Court, as well as at pages 41 and 42 of our Brief for Respondents in Opposition in Case No. 621 before this Court—it is only possible to conclude that Petitioners intend using every possible device for additional delay.

E. The State Court Had Jurisdiction to Determine the Usury Claim Against the National Bank.

Notwithstanding the finality of the many decisions adverse to them on the same jurisdictional question throughout every stage of these complex proceedings, Petitioners present the same argument to this Court for the third time, now additionally contending that this Court, in *Mercantile National Bank at Dallas* v. *C. H. Langdeau,* (1963) 371 U.S. 555, 9 L. Ed. 2d 523, 83 Sup. Ct. 520, and *Michigan National Bank* v. *Robertson,* (1963) 372 U.S. 591, 9 L. Ed. 2d 961, 83 Sup. Ct. 914, has given support to their position.

That a State Court has jurisdiction to determine a usury claim against a national bank, and that this is not a field pre-empted by Federal legislation, cannot be doubted. *Section 5198* of the *Act of Congress* of February 25, 1863, as amended by the *Act* of February 18, 1875, and quoted in the Appendix to the Opinion of the Court in *Mercantile National Bank at Dallas* v. *Langdeau, supra,* provides as follows:

> "SEC. 5198. The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred. *That suits, actions, and proceedings against any association under this title may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established,*

or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases." (Amendment underscored).

The Act specifically grants to the State Courts jurisdiction to try usury claims against national banks and there can be no question of the jurisdiction of the Florida State Court to try such an action. The only possible question is that of procedure. Although *McCollum* v. *Hamilton National Bank of Chattanooga,* (1938) 303 U.S. 245, 82 L. Ed. 819, 58 Sup. Ct. 568, and many other earlier cases, require such claims to be asserted in a separate action, all of such cases were decided without consideration of the adoption, effective September 6, 1938, of the *Federal Rules of Civil Procedure.* The only case that has been decided on this point with consideration of the adoption of the *Federal Rules of Civil Procedure* is the case of *John R. Alley & Co.* v. *Federal National Bank of Shawnee, supra,* in which the Circuit Court of Appeals decided that usury penalties could be and should be recovered by way of counterclaim.

In that case, the Federal National Bank alleged that John R. Alley & Company, a contractor, was indebted to it for the balance due on certain notes. The contractor counterclaimed, charging the bank with usury and praying forfeiture of twice the amount of usurious interest charged. The bank moved to dismiss the counterclaim on the ground that such claim must be the subject of a separate action or an original proceeding, and the lower Court granted the motion and dismissed the counterclaim. The Circuit Court of Appeals reversed, holding in part as follows:

"* * * The spirit of the new rules is to have a speedy adjudication of all controversies between the parties

in a single action and without a multiplicity of suits. The counterclaim arose out of the transaction and is maintainable in this action, unless prohibited by some rule of law.

"The Congressional authority given the Supreme Court to adopt rules was limited to matters of procedure in the Federal District Court. It was expressly provided that substantive rights should neither be abridged, enlarged nor modified. They were left untouched by the rules. 48 Stat. 1064, 28 U.S.C.A. § 723b. * * *

"It is necessary to distinguish between a substantive right and the vehicle or medium through which it is enforced. The substantive right created by the statute is the right to recover twice the amount of usury as a penalty. This right could in no wise be affected by the new rules. The method of procedure provided in the statute for the enforcement of the right was an independent action in the nature of an action of debt, and under the decisions it was held that this right could not be asserted in the form of a counterclaim in a pending action. But the new rules provide for the settlement of all controversies arising between parties in a single action. They specifically provide for compulsory counterclaims arising out of a 'transaction' or 'occurrence'. The right to the penalty admittedly arose out of the transaction which the bank seeks to enforce and is therefore maintainable as such under the new rules.

"If there is a conflict between the procedure provided for in the statute for the enforcement of the right created thereby and that provided for in the New Rules of Civil Procedure, the former must yield to the latter, because the Congressional authority under which the new rules were adopted expressly provides that after they become effective any laws in conflict therewith are of no further force or effect. The new rules have the force and effect of statutes. Sibbach v. Wilson & Co., 312 U.S. 1, 61 S. Ct. 422, 427, 85 L. Ed. 479.

"As was said in the last cited case: '* * * the new policy envisaged in the enabling act of 1934 was that the whole field of court procedure be regulated in the interest of speedy, fair and exact determination of the truth.' We see no reason why the new rules should not apply to the remedy to be employed in asserting the substantive right to recover the penalty provided by law in the case of usury."

It would be presumptuous for us to attempt to add to the concise and convincing argument advanced by the Circuit Court of Appeals. We believe it to be indisputable not only that the penalty can be recovered by way of counterclaim, but also that failure so to counterclaim, by the compulsory counterclaim provisions of the *Federal Rules*, and by similar provisions of the *Florida Rules of Civil Procedure*, would constitute a waiver of any right. *Rule 1.13 (1), Florida Rules of Civil Procedure.*

We note with pride that the argument above advanced is exactly the same argument which we have heretofore so many times presented, and in which we have been sustained not only by every Appellate Court within the Florida judicial system, but also twice by the United States Court of Appeals for the Fifth Circuit. This Court will recall having seen this discussion twice before, when it denied the prior Petitions for Writ of Certiorari presented by Banks.

Neither *Mercantile National Bank at Dallas* v. *C. H. Langdeau, supra,* nor *Michigan National Bank* v. *Robertson, supra,* in any way reaffirm the rule of *McCollum* v. *Hamilton National Bank of Chattanooga, supra.* They do not ever mention *McCollum, supra,* because their problem is that of venue. Both cases recognize that pursuant to the *National Banking Act,* national banks have a venue privilege to be sued in the County of the State in which they are located; but that such venue privilege can be

waived in any of the various ways by which venue privileges are waived. If a venue question was involved in the original proceedings in the Florida State Court, it certainly was waived, in that Banks, themselves, picked the Florida State Court when they filed therein their complaint for foreclosure and for deficiency decrees against Surety and others. These cases in no way aid Banks' untenable position.

Neither is *Southern Construction Company, Inc.* v. *United States for the use of Samuel J. Pickard,* (1962) 371 U.S. 57, 9 L. Ed. 2d 31, 83 Sup. Ct. 108, when correctly interpreted, of any comfort to Banks. Their interpretation (Petition, page 34) of this case as holding the Federal Rules of Civil Procedure to be inapplicable where the Federal Statute creating the right also provides for the remedy, is not correct. *Pickard, supra,* does not involve a Federal statute which creates a new right and also specifically and exclusively provides for the remedy. It involves the Miller Act (40 U.S.C. § 270 b), which provides that a suit on a contractor's payment bond shall be brought in the Federal District Court for the District in which the contract was to be performed and not elsewhere. It does not create a new remedy; but provides a new method of procedure whereby a proper claim may be collected.

The plaintiff below properly split his claims against the contractor involved so as to file suit in two different Federal District Courts, in each such Federal District Court attempting to collect the amount allegedly due plaintiff by the defendant-contractor on account of the work done within that District. It was contended that the Federal Rules of Civil Procedure required a counterclaim asserted by the contractor to be filed in whichever of the Federal District Courts the contractor's answer was first filed; and that failure to file it there prevented it being filed as a counterclaim in the other Federal District Court action.

This Court, recognizing *Rule 13(a)* of the *Federal Rules of Civil Procedure*, pointed out that the Rule was:

> "* * * particularly directed against one who failed to assert a counterclaim in one action and then instituted a second action in which that counterclaim became the basis of the complaint."

and said that this policy had no application under the facts of the case. This Court said:

> "* * * Under these circumstances, we hold that Rule 13 (a) did not compel this counterclaim to be made in whichever of the two suits the first responsive pleading was filed. Its assertion in the later suit, to which Southern, not without reason, considered it more appurtenant (pp. 28, 29, supra), by no means involved the circuity of action that Rule 13 (a) was aimed at preventing."

This Court did not in any way hold the Miller Act to overrule the Federal Rules of Civil Procedure, but rather noted that the situation involved was not one intended to be covered by the compulsory counterclaim rule. *Pickard, supra*, does not overrule *Alley, supra*; neither does it add any weight to *McCollum, supra*.

The numerous prior Opinions holding that the State Court had jurisdiction to determine the usury claim against the National Bank are not only res judicata; they are also correct. The Petition for Writ of Certiorari should be denied.

F. There Is No Federal Question As to the State Bank.

Regardless of the device sought to be used to raise the issue, this Court will not review decisions of a State Court with respect to State Law where there is no contention that the State Law or the interpretation thereof

are in any wise repugnant to any Federal Statute or to the Constitution of the United States. There is no intimation, in this third voluminous Petition for Writ of Certiorari, of any Federal question having been raised with respect to the State Bank. Petitioners do not now and never have contended that any Federal principle, however remote, has been violated with reference to the State Bank. There is not even an alleged error with reference to Petitioner, Pan American Bank of Miami, a State Bank; indeed, nowhere in any of the multitude of appellate procedures by which Petitioners have so long delayed the distribution of the funds in the Registry of the Reorganization Court, has any such contention ever been made.

The usury recovery against the National Bank, pursuant to Federal Law, was $74,867.72, plus interest; and the usury recovery against the State Bank, pursuant to State Law, was $265,999.27, plus interest. It seems to us plain that Petitioners, when they talk in their Petition of a $500,000.00 penalty against the National Bank, seek to confuse this Court and further delay these proceedings. Even if there were some merit to the contention of the National Bank, and there is not, it cannot be disputed that the State Court applied State Law to the State Bank.

The State Bank was not even a party to the bankruptcy or reorganization proceedings. It did not file a claim of any kind or otherwise make any appearance in either the bankruptcy or reorganization proceedings (see 299 F.2d 736, n. 5 at 738). Its first appearance, when it joined in the motion for order directing Trustee to pay funds (R. 379), was subsequent to the 1962 Opinion of the Fifth Circuit.

We most respectfully suggest that the Petition has as its purpose continued delay in the distribution of these

funds to the creditors entitled thereto and is an attempt on the part of the State Bank to hide behind its affiliate National Bank, and so hiding, to confuse this Court by riding on the coat tails of a fictional error claimed by Petitioner-National Bank. We suggest that this procedure serves to confirm the Florida District Court Opinion rendered in 1960 (119 So. 2d 741, at 748):

> "A careful scrutiny of the proceedings that took place at the time of and subsequent to the making of the original loan indicates that by the device of participation, **the State Bank attempted to lend its funds through a chartered National Bank without subjecting itself to the loss of its principal in the event that the loan was found to be usurious** under § 687.07, Fla. Stat., F.S.A. The most that the State Bank could lose if this device was successful, using the National Bank as its conduit, would be double the interest actually received by the National Bank or a forfeiture of interest that was to accrue."

There is no possible basis for complaint by the State Bank. The only possible purpose for the multitude of appeals and petitions for writ of certiorari which it has instituted and in which it has participated was continued delay.

G. The Petition Fails to Properly Invoke the Jurisdiction of This Court; There Is No Important Question of Federal Law.

It would appear that Petitioners seek to invoke the jurisdiction of this Court either on the basis of an alleged erroneous interpretation by the State Court of a portion of the *National Banking Act* (12 U.S.C., §§ 85 and 86); or, on the basis that the action of the State Court in accepting jurisdiction, and the actions of the Federal Courts, both Trial and Appellate, in sustaining the State Court's jurisdiction, allegedly in some way violate the equal pro-

tection or the due process clause of the *Constitution of the United States*. A short discussion of these alleged errors will serve to show that neither have been properly raised or preserved, and that Petitioners have failed to show, as required by *Rule 19* of the *Rules of this Court*, any "special and important reasons" why this Court should grant the review sought.

1. The Constitutional Question.

The points on appeal filed by Petitioners in connection with the second appearance of this matter in the United States Court of Appeals for the Fifth Circuit (R. 457) make no mention of any constitutional question. It is accordingly not at all surprising that the Opinion which Petitioners would now have this Court review contains no mention of any constitutional question. Furthermore, the Petition for Rehearing which Petitioners addressed to the United States Court of Appeals for the Fifth Circuit (See A.19 of Petition) fails to mention any constitutional question. It is, therefore, most respectfully contended that Petitioners have no standing to ask this Court to review any alleged constitutional question.

2. The National Banking Act.

As to the *National Banking Act*, Petitioners seemingly contend (a) that the usury penalties thereby provided cannot be recovered by way of counterclaim, and (b) that the State Court erred in its calculations as to the interest paid to Petitioner, The Coral Gables First National Bank, upon which the double usury penalty of the *National Banking Act* would be based.

As indicated by the Opinion sought to be reviewed, the validity of the State Court Judgment has been finally adjudicated and conclusively settled by previous adjudi-

cations not now open to attack by the Banks, both in the State Court and by the Opinion of the United States Court of Appeals for the Fifth Circuit of February 19, 1962 (299 F.2d 736), which Petitioners did not seek to have reviewed by this Court.

Furthermore, as we have indicated in part E hereof, at page 29, the State Court had jurisdiction to determine the usury question against the National Bank. Its determination of the quantum of the usury penalty, pursuant to the *National Banking Act*, was correct, as we have demonstrated in part D hereof, at page 25. There is no showing of any basis by which the United States Court of Appeals for the Fifth Circuit could have overruled the proper finding of the State Court. No alleged error of the State Court was preserved in any fashion which would have allowed the United States Court of Appeals for the Fifth Circuit to overrule it. As that Court said in 1962 when this matter was first before it (299 F.2d 736, 739, 740):

> "To sugar-coat this bitter pill, the Banks insist that the Florida Courts committed critical and substantial errors in the application of the National Banking Act as to usury penalties. But this is unavailing since it must be recognized that State Courts are competent to adjudicate cases arising under, or affected by, that Federal law. The fact—asserted by the Banks—that the Florida Courts erred would not give a Federal District Court any power to 'correct' that error by a review or, worse, a prohibitory injunction. See 28 U.S.C.A. § 2283. If the Bankruptcy Court had the power to permit the Florida Court to continue, and if the Florida Court had the power to continue that litigation, then that power included the power to err. And, so long as any such action by the Florida State Court did not encroach upon the exclusive jurisdiction of the Bankruptcy Court or otherwise on an exclusive Federal domain, correction of any error—the

occurrence of which we do not begin to imply—would have to come through regular processes of the Florida system.

* * * * *

"These facts all combine to make it perfectly clear that the Bankruptcy Court in the Reorganization proceedings had the power—and properly exercised it within its considered discretion—to continue this much of the State Court litigation. The authorities abundantly sustain the existence of this power and nothing in the cases so vigorously pressed by the Banks opposed either the existence of the power or its proper use under the circumstances of this record.

* * * * *

"In spite of the complexities brought out in the briefs and arguments, the question before us remains the basic one of whether the District Court had the power to permit the litigation to continue in the State Courts with adequate control reserved as to the ultimate disposition of its fruits. The record before us leaves little doubt that the Bankruptcy Court had the power and the exercise of that power was well within its discretion—and especially so when the Banks instituted the State Court litigation, expressly approved and consented to its continuation, took the position for the first time in 1961 that the State Courts had lost their power a year earlier to determine the issues, and on the eve of the hearing in this Court were still seeking a reversal of the 'erroneous' decision by the State Court."

The Petition for Writ of Certiorari should be denied.

H. There Is No Conflict of Decisions.

Petitioners, contending that the Opinion to which their Petition for Writ of Certiorari is addressed conflicts with decisions of this Court, rely upon *Durfee* v. *Duke, supra*; *Kalb* v. *Feuerstein, supra*; *United States* v. *United States*

F. & G. Co., supra; and *Gondeck* v. *Pan American World Airways, supra.* We respectfully contend that there is no such conflict.

Durfee v. *Duke, supra,* discussed at pages 42 and 43 of the Petition, is certainly of no comfort to Petitioners. It specifically holds, as this Court has previously held in *Stoll* v. *Gottlieb, supra,* that, in the absence of an allegation of fraud in obtaining the judgment, there was no reason for the Court to examine again the question of whether the Court making the earlier decision on an actual contest over jurisdiction between the parties, did have such jurisdiction of the subject matter of the litigation. The dicta in *Durfee* v. *Duke, supra,* to the effect that this general rule of finality of jurisdictional determinations is not without exceptions, such as the doctrines of Federal pre-emption or sovereign immunity, certainly has no application to the matter now before the Court. As this Court said in *Durfee* v. *Duke, supra* (at 114):

> "* * * no such overriding considerations are present here."

The United States Court of Appeals for the Fifth Circuit was not concerned with federal pre-emption or sovereign immunity; it merely held that its previous Opinion was res judicata. Conceivably—because the first Opinion of the Fifth Circuit held a State Court determination to be res judicata—there might have been some basis for raising these doctrines if a Petition for Writ of Certiorari had been addressed to the first Opinion of the United States Court of Appeals for the Fifth Circuit. But this Opinion is long since final.

Stated another way, even these exceptions do not permit a second collateral attack. *Kalb* v. *Feuerstein, supra,* relied upon by Petitioners on page 3 of their Petition, al-

though holding that the State Court had no jurisdiction to complete foreclosure where a farmer-debtor had a Petition pending in a Bankruptcy Court under the *Frazier-Lemke Act*, is easily distinguishable on either of two bases. This was not a second collateral attack involving identically the same parties. Even more important, this Court, in *Kalb* v. *Feuerstein, supra*, noted that the congressional purpose in the *Frazier-Lemke Act* was to deprive the State Court of any power or jurisdiction to maintain foreclosure proceedings **without consent after hearing** by the Bankruptcy Court in which the farmer's petition was pending. This Court said:

> "Thus Congress repeatedly stated its unequivocal purpose to prohibit—**in the absence of consent by the bankruptcy court** in which a distressed farmer has a pending petition—a mortgagee or any court from instituting, or maintaining if already instituted, any proceeding against the farmer to sell under mortgage foreclosure, to confirm such a sale, or to dispossess under it."

Petitioners have conveniently overlooked the Bankruptcy Court's permission, granted to the State Court in the instant case, to continue the State Court litigation.

United States v. *United States F. & G. Co., supra*, turned upon the doctrine of sovereign immunity. This Court said:

> "The reasons for the conclusion that this immunity may not be waived govern likewise the question of res judicata. As no appeal was taken from this Missouri judgment, it is subject to collateral attack only if void. It has heretofore been shown that the suability of the United States and the Indian Nations, whether directly or by cross-action, depends upon affirmative statutory authority. Consent alone gives jurisdiction, to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void. The fail-

ure of officials to seek review cannot give force to this exercise of judicial power."

The key to the distinguishing factor lies in this Court's conclusion, as above stated, that the failure of officials to seek review cannot give force to the exercise of judicial power. From this it follows that, if the officials had sought review, and if the Appellate Tribunal had determined that the immunity had been waived, or that there was no immunity, surely the same appellants could not thereafter collaterally attack the appellate decision. Neither could the same parties present the same issues for the second time to the same appellate Court and, after that Appellate Court had reached the same decision, then expect this Court to grant certiorari.

Gondeck v. *Pan American World Airways, supra,* relied upon by Petitioners at page 46 of their Petition, is of no avail to them. In *Gondeck, supra,* intervening circumstances of substantial effect persuaded this Court to relax its usual rules and to grant a second petition for rehearing out of time. There is no similarity between *Gondeck, supra,* and the matter now before this Court. No other Circuit Court of Appeals has expressed a view favorable to Petitioners; the Court below has not expressed doubt as to its decision in the instant case (indeed its decision in the instant case holds its prior determination to be res judicata); and there is no subsequent decision of this Court which expresses a view favorable to Petitioners.

There is no conflict of decisions.

VIII. CONCLUSION

Waxing eloquent in their attempts to obtain admittance to this Court and implying (Petition, page 29) that the second Opinion of the United States Court of Appeals for the Fifth Circuit, if allowed to stand, would eliminate any effectiveness of rules and regulations promulgated by the Comptroller of Currency—would render of no use of statutory enactments of Congress—Petitioners would apparently have this Court believe that their actions were normal every day occurrences; that the *National Banking Act* was designed to protect National Banks in just such situations as these.

But certainly the exacting of criminal usury is not a normal and customary business practice of National Banks. The *National Banking Act* was not designed or intended to protect National Banks in the event they should so conduct their business. This is the same sort of transparent argument as that of the Alabama Banking Association as amicus curiae in *Daniel* v. *First National Bank of Birmingham,* (5 Cir., 1956) 228 F.2d 803, where the Court said (806-807):

> "The amicus curiae, Alabama Banker's Association, rather plaintively inquires:
>
> " 'If the Court should be willing to do no more than to indicate how the function of discounting paper can escape the hazard of factual uncertainty and highly technical minutiae to escape attack, it would be of

great service and might indeed tend to avoid a panic retrenchment in installment paper discounting.'

* * * * *

"The appellee **Bank admits that it charged usurious discounts** contrary to the federal statute. See 12 U.S.C.A., § 85 (footnote 1 to orginal opinion); Gloversville National Bank v. Johnson, 14 Otto 271, 104 U.S. 271, 26 L. Ed. 742. **It insists, however, that it was pursuing a usual and customary business practice.** Whether so or not, it is a practice which it must concede that a National Bank can safely engage in only so long as it can rely on its assignor not to sue under the federal statute. Probably such reliance is justified if its assignor has passed on the usurious interest rate to the purchaser of the vehicle. No doubt the Bank views its legal status from a position different from that of this Court. It seems to us that in reality what the Bank is asking this Court to hold is that probably the most numerous class of persons in need of protection from the state and national laws against usury are removed from that protection by the simple expedient of using the term 'time price' as a cloak to conceal usury. That, we of course will not do. The petition for rehearing is

"Denied."

The exacting of criminal usury by Banks is against the laws of the United States, against the laws of Florida, contrary to business ethics, and violates public policy. As we said when we concluded our Briefs in Opposition before this Court in Cases Nos. 559 and 621, when the veil of self-righteous hypocrisy of Petitioners' claim is pierced, there can be no question of the correctness of the holding

by the District Court of Appeal of Florida, Third District, that (119 So. 2d 741, at 748):

> "A careful scrutiny of the proceedings that took place at the time of and subsequent to the making of the original loan indicates that by the device of participation, the State bank attempted to lend its funds through a chartered National bank without subjecting itself to the loss of its principal in the event that the loan was found to be usurious under § 687.07, Fla. Stat., F.S.A. The most that the State Bank could lose, if this device was successful, using the National Bank as its conduit, would be double the interest actually received by the National Bank or a forfeiture of interest that was to accrue."

The Petition should be denied.

Respectfully submitted,

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IX. PROOF OF SERVICE

It is Hereby Certified that a true and correct copy of the foregoing Brief of American Surety Company of New York, Respondent, In Opposition, has been furnished by United States Mail, on this 25 day of January, A. D., 1966, to the following:

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